

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RANDY MATHIS,	)
	) No. 427, 2008
Defendant Below,	)
Appellant,	) Court Below: Superior Court
	) of the State of Delaware in
v.	) and for New Castle County
	)
STATE OF DELAWARE,	) Cr. ID. No. 0406015383
	)
Plaintiff Below,	)
Appellee.	)

Submitted: December 17, 2008

Decided: February 19, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

***ORDER***

This 19<sup>th</sup> day of February 2009, it appears to the Court that:

(1) Randy Mathis appeals from the Superior Court’s order denying his motion for postconviction relief. Mathis contends that his trial counsel provided ineffective assistance by failing to request a jury instruction consistent with 11 *Del. C.* § 470, which would have allowed the jury to find Mathis guilty of manslaughter but not murder in the second degree, if the jury believed that he was “reckless” in the use of deadly force against his victim. We find no merit to this argument.

(2) On September 19, 2005, a jury found Mathis guilty of murder in the second degree and possession of a firearm during the commission of a felony (“PFDCF”). His convictions stemmed from a June 12, 2004 fight between Mathis

and Ronnie Hollingsworth. Two days before the fight, Ronnie robbed Mathis at gunpoint. When Ronnie's brother Ronsheen arrived at the fight, he saw Mathis armed with a gun, which Mathis put away when Ronsheen intervened. Ronnie, unarmed, swung his fist at Mathis, who then pulled out his gun and shot Ronnie twice, killing him. After his arrest, Mathis confessed to shooting Ronnie, but claimed he acted in self defense.<sup>1</sup>

(3) On December 16, 2005, the trial judge sentenced Mathis to a total of 25 years in jail, followed by probation.<sup>2</sup> On August 21, 2006, we affirmed Mathis' convictions on direct appeal.<sup>3</sup> On August 20, 2007, Mathis filed a motion for postconviction relief under Superior Court Criminal Rule 61 alleging that he received ineffective assistance from his trial counsel, under the Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution.<sup>4</sup> Specifically, Mathis alleged that his counsel failed to raise a claim of "imperfect self defense," under 11 *Del. C.* § 470(a) at trial. Mathis alleged that if the jury had

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<sup>1</sup> *Mathis v. State*, 907 A.2d 145, 2006 WL 2434741, at \*1 (Del. 2006) (Table) (Order) [*"Mathis I"*]; see also *State v. Mathis*, 2008 WL 3271148, at \*1 (Del. Super. Ct. July 30, 2008) (Order) [*"Rule 61 Order"*].

<sup>2</sup> *Rule 61 Order*, at \*1.

<sup>3</sup> See *Mathis I*, 2006 WL 2434741.

<sup>4</sup> See Super Ct. Crim R. 61.

accepted that defense, he would have been convicted of manslaughter rather than murder second degree.

(4) The Superior Court denied that motion on July 30, 2008, finding that “not only were trial counsel’s decisions appropriate and reasonable, his failure to specifically request a Section 470 instruction had no effect on the outcome of the case and would have been harmful and inconsistent with his efforts to obtain an acquittal of the Defendant.”<sup>5</sup> This appeal followed.

(5) We review the Superior Court’s denial of a motion for postconviction relief on claims of ineffective assistance of counsel for abuse of discretion.<sup>6</sup> “In discharging its appellate function, the Court must carefully review the record to determine whether competent evidence supports the court’s findings of fact and whether its conclusions of law are not erroneous.”<sup>7</sup> To prevail on a claim of ineffective assistance of counsel, a defendant must establish that: (i) his counsel’s representation fell below an objective standard of reasonableness; and (ii) but for counsel’s unprofessional errors, the outcome of the proceeding would have been

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<sup>5</sup> *Rule 61 Order*, at \*3.

<sup>6</sup> *Gattis v. State*, 955 A.2d 1276, 1287 (Del. 2008); *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996); *accord Drummond v. State*, 2008 WL 4989125, at \*1 (Del. Nov. 25, 2008) (Order).

<sup>7</sup> *Gattis*, 955 A.2d at 1287; *Dawson*, 673 A.2d at 1196.

different.<sup>8</sup> To satisfy this test, a defendant must overcome a “strong presumption” that he received professionally reasonable representation, as well as show that his trial counsel’s unreasonable conduct called into question the reliability of the proceedings.<sup>9</sup>

(6) Mathis contends that his counsel provided ineffective assistance by failing to raise a claim of “imperfect self defense” and by failing to request an instruction pursuant to 11 *Del. C.* § 470, which states:

When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such relief would establish a justification under §§ 462-68 of this title but the defendant is reckless or negligent in having such belief . . . the justification afforded by those sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.<sup>10</sup>

Mathis asserts that, had his counsel advanced this theory and the jury determined it applied, he could not have been convicted of murder in the second degree and, at worst, could only have been found guilty of manslaughter. This argument lacks

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<sup>8</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hill v. Lockhart*, 474 U.S. 52, 59 (1984); accord *Drummond*, 2008 WL 4989125, at \*1.

<sup>9</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1998); *Strickland*, 466 U.S. at 689, 694.

<sup>10</sup> 11 *Del. C.* § 470(a).

merit under both prongs of the *Strickland* test for evaluating allegations of ineffective assistance of counsel.<sup>11</sup>

(7) Under the first prong, the Superior Court found that Mathis’s trial counsel made a strategic decision not to request a Section 470 instruction. As a result, it applied the highly deferential standard for trial tactics set forth in *Strickland* and found that counsel’s representation satisfied an objective standard of reasonableness.<sup>12</sup> Although Mathis correctly notes that merely invoking the word “strategy” to explain an alleged error is insufficient to warrant the highly deferential standard, the court applied that standard only after determining that trial counsel made his choices “after careful consideration of the facts and the law, and after discussing them with his client.”<sup>13</sup>

(8) In reaching this decision, the Superior Court looked to trial counsel’s affidavit responding to Mathis’s claims.<sup>14</sup> In that affidavit, trial counsel explained:

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<sup>11</sup> See generally *Strickland*, 466 U.S. 668.

<sup>12</sup> *Rule 61 Order*, at \*2. See *Strickland*, 466 U.S. at 690 (explaining that “strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable.”).

<sup>13</sup> *Rule 61 Order*, at \*2

<sup>14</sup> Super. Ct. Crim. R. 61(g)(1) permits the judge to “direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion [for postconviction relief].” Super. Ct. Crim. R. 61(g)(2) expressly provides that “[i]f the motion alleges ineffective assistance of counsel, the judge may direct the lawyer who represented the movant to respond to the allegations.” Indeed, in *Horne v. State*, 887 A.2d 973,

[T]he defendant's position was always justification and he sought a verdict of not guilty from the jury. The primary thrust of the defense presented at trial was that the defendant was not guilty and counsel's strategy at trial was to focus on that defense. It was felt that spending a significant amount of time in the closing or otherwise arguing for lesser included offenses was counterproductive to the defendant's position as articulated to counsel.

(9) Trial counsel further noted that, although he argued lesser included offenses as a secondary position, he declined to spend too much time on that argument lest it distract the jury from the primary defense of justification. Thus, rather than request an instruction pursuant to Section 470, "[c]ounsel felt that the best chance for a conviction of a lesser included offense in addition to portraying the victim as a violent individual himself, was to argue that the defendant did not intend to kill, but rather only intended to inflict serious physical injury."

(10) Finally, responding directly to Mathis's claim that he should have requested a Section 470 instruction, trial counsel explained that:

[T]o argue as [Mathis] would now have had counsel argue that the defendant was 'reckless' in believing that he was in fear of death or serious physical injury would have compromised counsel's primary argument in the case for a not guilty verdict. If the jury did not accept counsel's primary defense, there was ample evidence in the record that they could have come back with a verdict of a lesser included offenses including one of manslaughter.

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975 (Del. 2005), we explained that where the defendant raises claims of ineffective assistance of counsel in a Rule 61 motion, the preferred practice is for the Superior Court to obtain trial counsel's affidavit responding to the claims of ineffectiveness.

(11) Trial counsel's affidavit indicates that he made a strategic choice not to request a Section 470 instruction in Mathis's defense after a thorough investigation of the law and facts relevant to plausible options. Therefore, competent record evidence supports the Superior Court's deference to trial counsel's strategic choices.

(12) Under the second prong, the Superior Court found that the jury's decision mooted the harm alleged by Mathis because their verdict of murder in the second degree rather than first degree required them to find Mathis acted recklessly, not intentionally. Thus, the court found that Mathis received the benefit of a Section 470 instruction without the trial judge actually giving it. Even assuming trial counsel failed to meet the objectively reasonable standard, Mathis could not show that the proceedings were unreliable. Mathis erroneously contends that the Superior Court erred as a matter of law by finding that a verdict of murder in the second degree was permissible under Section 470.

(13) At trial, Mathis's primary defense strategy was that, under 11 *Del. C.* § 464(c), his use of deadly force against Ronnie was justified because he genuinely believed that Ronnie posed an immediate threat of death or serious physical

injury.<sup>15</sup> Asserting this defense forced Mathis to concede that he intentionally employed deadly force but that he genuinely believed he needed to use deadly force to protect himself from death or serious harm.

(14) Section 470 applies when a defendant recklessly or negligently forms a belief that he needed to use force. This section provides a defense to intentional crimes but creates liability for crimes that require a *mens rea* of recklessness or criminal negligence.<sup>16</sup> As a result, while justification could have provided a defense to first degree murder, it provided no defense to the lesser included offenses with less culpable mental states.<sup>17</sup>

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<sup>15</sup> See 11 Del. C. § 464(c), which provides: “The use of deadly force is justifiable under this section if the defendant believes that such force is necessary to protect the defendant against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat.”

<sup>16</sup> 11 Del. C. § 470.

<sup>17</sup> See COMMENTARY, DELAWARE CRIMINAL CODE § 470 (1973), which provides:

As has often been stated in the foregoing Commentary, the sections on justification look only to the actor’s belief in the necessity of force and not to the reasonableness of the belief. *Subsection (a)*, therefore, is designed to cover the situation in which the actor is reckless or negligent in forming a belief as to the necessity for force. It provides that when the actor is so reckless or negligent, he may be held guilty of any crime which may be committed recklessly or negligently. If, for example, the actor is reckless in forming his belief that deadly force is being employed against him, he may be convicted of manslaughter, but not of murder. Because manslaughter may be committed recklessly, he has no defense; *subsection (a)* specifically deprives him of it ... Thus, while the actor would have a defense to a crime requiring intention, he is guilty of recklessness and may be convicted of any crime requiring that state of mind.



(15) Mathis argues that Section 470 does not support a conviction for murder in the second degree because, unlike manslaughter, it requires more than mere recklessness; Section 470 also requires that the jury find that the defendant's conduct "manifested a cruel, wicked, and depraved indifference to human life," which elevates the *mens rea* for murder in the second degree from recklessness to something more culpable.<sup>18</sup> This argument lacks merit.

(16) First, the absence of a Section 470 instruction benefited Mathis because he was able to argue for a not guilty verdict on all charges based on the instruction actually given. Moreover, Section 470 applies to murder in the second degree. As we explained in *McKinley v. State*, although the words "cruel, wicked and depraved indifference to human life" differentiate the two crimes,<sup>19</sup> both murder in the second degree and manslaughter require the same "reckless" state of

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<sup>18</sup> See COMMENTARY, DELAWARE CRIMINAL CODE § 635 (1973), which makes clear that murder second degree is a crime of recklessness:

Subsection (1) covers reckless killing which is distinguished from manslaughter by "circumstances which manifest a cruel, wicked, and depraved indifference to human life." This is not unlike the former law which, by use of the concept of "implied malice" treated the most aggravated reckless killings as second-degree murder. It will be a jury question in each case whether a killing is so serious in its circumstances to amount to second degree murder, or is only manslaughter. The distinction is one of degree only.

<sup>19</sup> See *Waters v. State*, 443 A.2d 500, 502-03 (Del. 1982) ("The basic difference between Manslaughter and Murder in the Second Degree ... is that the latter requires a showing that the homicide was committed 'under circumstances which manifest a cruel, wicked and depraved indifference to human life,' while the former does not.").

mind defined by section 231(c).<sup>20</sup> Thus, the distinction between manslaughter and murder in the second degree is one of degree only.<sup>21</sup> The Superior Court properly found that, even if the trial judge gave a Section 470 instruction, the verdict of murder in the second degree would still have been available to the jury. Accordingly, trial counsel's failure to request a Section 470 instruction did not prejudice Mathis.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>20</sup> *McKinley v. State*, 945 A.2d 1158, 1161 & n.3 (Del. 2008) (citing *Hamilton v. State*, 816 A.2d 770, 773 (Del. 2003)). Compare 11 Del. C. § 632 (“A person is guilty of manslaughter when: (1) *The person recklessly causes the death of another person ....*”) with 11 Del. C. § 635 (“A person is guilty of murder in the second degree when: (1) *The person recklessly causes the death of another person* under circumstances which manifest a cruel, wicked and depraved indifference to human life....”); see also 11 Del. C. §231(c) (defining “recklessness”).

<sup>21</sup> See COMMENTARY, DELAWARE CRIMINAL CODE § 635 (1973).